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No. 2650

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

LOUIS BUTTNER,
Libelant and Appellant,

vs.

MARY A. ADAMS et al.,
Respondents and Appellees.

BRIEF FOR APPELLEES.

A. E. COOLEY,
Proctor for Appellees.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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THE AMENDED LIBEL DID NOT STATE A CAUSE OF ACTION.

Inasmuch as this appeal is taken from an order sustaining respondents' exceptions to the libel, the allegations therein, for the purpose of this proceeding, must be deemed to be true. They do not, however, state a cause of action in admiralty and the learned trial judge, in sustaining the exceptions and in denying a petition for rehearing, correctly laid down the law upon the points involved. His opinion on the first hearing is printed on pages 17 to 19 of the Apostles on Appeal.

We present three grounds for the support of the decision, any one of which is sufficient.

First. The libel shows that this is an action based upon stockholders' liability for an alleged tort of the corporation, wherein it affirmatively appears that the indefinite or inchoate tort liability has become merged in a judgment, fixing at a definite amount the liability of the corporation. Inasmuch as the stockholders can be held only for the liability of the corporation, the libel defeats itself by showing upon its face that it is an attempt to fix at a different amount the liability of the corporation for the tort—a thing that has been determined by a court of competent jurisdiction. As stated in the opinion of Judge Dooling, "the judgment is now the measure of respondents' liability".

Second. Libelant having selected the State court to fix the liability, should be relegated to that tribunal to enforce it.

Third. This action is not maritime in its nature and the Admiralty court has no jurisdiction over it. It is not claimed that the stockholders themselves committed the tort—which was maritime—but that they are responsible because of the California law governing stockholders' liability. The Admiralty law knows no such thing as a stockholders' liability and a State law cannot give a right in admiralty. The right of action against stockholders is contractual in its nature, but the contract is not maritime; it is one arising by implication from the State law.

We shall discuss these points briefly in the order named.

I.

THE TORT LIABILITY MERGED IN THE JUDGMENT AND THAT JUDGMENT IS NOW THE MEASURE OF APPELLANT'S RIGHTS.

We desire to present this point most strongly to the court, for the reason that it seems of vital importance to stockholders, at a time when most of the business of this country is done through corporations. A man purchasing stock impliedly contracts to pay his proportions of the debts and liabilities of the corporation; he expects every other stockholder to be held liable in the same proportion; and he does not contract for a liability different than that of the corporation.

Under the contention of appellant the corporation's liability may be fixed at one amount and the liability of the stockholders may be fixed upon as many different bases or units as there are stockholders—for there is nothing to prevent a separate suit being brought against each stockholder, and the corporation's liability found to be a different amount in each suit. This would be particularly true in tort actions.

We have no quarrel with counsel's contention that the liability of a stockholder is primary; but that primary liability is for the corporation's debts and liabilities arising from acts of its officers or

agents and not for any individual act or omission of the stockholder. Therefore, when the corporate liability is once fixed by judgment, it is fixed for both corporation and stockholder, although the latter's inchoate liability arose prior to the judgment.

It is our contention that there can be only one action for a given tort and that the tort is merged in the judgment in that action.

Mr. Freeman in his work on "Judgments" (4th Edition) Section 215, states the principle as follows:

> "The entry of a judgment or decree establishes in the most conclusive manner, and reduces to the most authentic form that which had hitherto been unsettled, and which had, in all probability, depended for its settlement upon destructible and uncertain evidence. The cause of action thus established and permanently attested is said to merge into the judgment establishing it, upon the same principle that a simple contract merges into a specialty. Courts, in order to give a proper and just effect to a judgment, sometimes look behind, to see upon what it is founded, just as they would in construing a statute, seek to ascertain the occasion and purpose of its enactment. The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It 'is drowned in the judgment', must be henceforth be regarded as *functus officio.*"

See also Sections 216, 217 and 218, *Freeman on "Judgments"*.

Black on "Judgments" (2nd Ed.) Section 9:

> "Whatever may be said in regard to a judgment which is rendered upon the actual contract of the parties, it must be perfectly apparent that a judgment upon a cause of action sounding in tort cannot be considered as in any sense a contract. True the judgment merges the action. But that means that the plaintiff cannot afterwards sue upon the original claim or use it otherwise. It does not mean that it is metamorphosed into something diametrically opposite to what it was before."

Id. Section 583:

> " 'Every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by a judgment against it.' This doctrine has also the sanction of the United States Supreme Court and the other federal courts, and is approved and accepted in many of the States, as well as in England."

In *Hawkins v. Glenn,* 131 U. S. 319; 33 L. ed. at page 391, Mr. Chief Justice Fuller said:

> "A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

In the case of *Jenkins v. Atlantic Coast Line R. R. Co.,* 179 Fed. 535, it appeared that the defendant had leased its railroad and equipment to the C. N. & L. Co., and for the use of its property was to receive "19 cents a mile and a stipulated car hire". The plaintiff in this action had pre-

viously sued the C. N. & L. Co. in the State court and a judgment had been rendered against her. The defendant pleaded that judgment as a bar to the action. The court held that there was privity between the defendant and the C. N. & L. Co. and that the judgment in the former action was a bar to this action. We quote from the opinion at page 539, as follows:

> "The same questions arise in the present action, and the same testimony would probably be offered on both sides. The plaintiff has had her day in court in a forum of her own choosing, wherein every element tending to show negligence upon the part of the carrier was or could have been presented, and a court of competent jurisdiction has decided against her. To use the words of Mr. Justice Campbell of the Supreme Court of the United States:
>
> 'Experience has disclosed that for the security of rights and the preservation of the repose of society, a limit must be imposed upon the facilities for litigation'."

The reasoning of the above case applies with equal force to the case at bar. In both cases there was privity between the defendant against whom the judgment was rendered, and the defendant or defendants against whom the judgment is sought to be recovered. The *Jenkins* case is founded upon the principle of privity between the parties, and this principle applies with equal force to the case at bar.

In *Emery v. Fowler*, 39 Me. 326, it is held that a judgment in an action for trespass brought

against an employer, is a bar to a subsequent action brought against his employee for the same wrong.

We cite also:

Wilson v. Seymour, 76 Fed. 678;
Henderson v. Bradley, 85 Fed. 508.

Counsel relies upon the dictum from *Young v. Rosenbaum*, 39 Cal. 646 (cited at page 7 of his brief), and apparently contends that this dictum was quoted with approval by this court in *Dolbear v. Foreign Mines Inv. Co.*, 196 Fed. 646. The *Young* case was not cited by this court to support the proposition that a judgment does not merge the right of action upon which it was based—that point was not involved in the *Dolbear* case.

Mr. Freeman, in Section 228 of his work on "Judgments", pointed out that the opinion in *Young v. Rosenbaum, so far as it relates to the question of merger* is mere dictum and does not correctly state the law. But even taking the language of the dictum at its full face value, it does not follow that the judgment does not merge the right of action against the corporation for tort. It would seem that the court meant by the language used, that a judgment rendered against the corporation did not, of itself, merge the right to sue the stockholders and thus prevent an action against the latter.

Counsel cites also the case of *Larabee v. Baldwin*, 35 Cal. 155, at 168. Had he finished the paragraph

from which he was quoting, he would have given the court the following significant language:

> "The judgment only merges and puts in a new form, against the will of both corporation and stockholders, an indebtedness which has already been contracted."

II.

LIBELANT HAVING SELECTED THE STATE COURT MUST ENFORCE HIS REMEDIES THERE.

While the corporation is not a party to these proceedings, nevertheless its liability must be determined in order that any judgment may be had against appellees, who are sought to be held solely for the liabilities of the corporation. Appellant chose the State court as his tribunal to determine the amount of the corporation's liability. He cannot now come into the Federal court and seek, by indirection, to fix that amount at a larger sum than that determined by the judgment of the State court.

We cite:

Hyatt v. Challiss, 55 Fed. 267;
Bailey v. Willeford, 126 id. 803;
Jenkins v. Atlantic Coast Line R. R. Co., supra.

III.

THE ADMIRALTY COURT HAS NO JURISDICTION OF AN ACTION BASED UPON STOCKHOLDERS' LIABILITY.

An action to recover upon the liability of stockholders is an action at law.

Morrow v. Superior Court, 64 Cal. 383.

It is a liability created by the organic law and by the statutes of the State of California.

Moore v. Boyd, 74 Cal. 167;
Hunt v. Ward, 99 id. 612;
Bank v. Pacific Coast S. S. Co., 103 id. 594.

It is therefore an action to recover for a statutory or contractual liability and is not an action for tort.

Pacific Surety Company v. L. & S. T. & W. Co., 151 Fed. 440.

A right to recover on stockholders' liability is unknown to the maritime law. The State law cannot confer jurisdiction upon an Admiralty court.

The Manhasset, 18 Fed. at page 923;
The Steamboat Orleans v. Phoebus, 11 Peters 175; 9 L. ed. 677 at page 680.

No doubt an action such as this could be maintained on the law side of a Federal court if the citizenship of the parties gave jurisdiction, but the Admiralty jurisdiction is limited and, as heretofore stated, it does not include causes arising out of stockholders' liability.

For the reasons stated herein we submit that the judgment of the District Court should be affirmed.

Dated, San Francisco,
March 11, 1916.

Respectfully submitted,

A. E. Cooley,
Proctor for Appellees.